

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2020-218-E - ORDER NO. 2021-300

MAY 4, 2021

IN RE: Alex Kadoshnikov, Complainant/Petitioner v. Duke Energy Carolinas, LLC, Defendant/Respondent) ORDER GRANTING) MOTION TO COMPEL) AND HOLDING) PROCEDURAL) DEADLINES AND) HEARING IN ABEYANCE
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INTRODUCTION AND PROCEDURAL SUMMARY

This matter comes before the Public Service Commission of South Carolina (“the Commission”) on the Motion of Duke Energy Carolinas, LLC (“Duke” or “the Company”) for an order compelling Complainant Alex Kadoshnikov (“Complainant”) to respond to the Company’s First and Second Sets of Discovery to Complainant. The Company also requests that the procedural deadlines, including the testimony filing deadlines and hearing date, be held in abeyance pending resolution of this Motion. Further, Duke requests that the Commission dismiss the Complaint should Complainant fail to provide complete responses to the Discovery by a date to be established by the Commission.

On March 17, 2021, the Company filed its First Set of Discovery to Complainant with the Commission and served a copy on Complainant via electronic mail and U.S. Mail. The discovery requested a summary of the Complainant’s education and professional experience and inquired as to the Complainant’s occupation. Further, the interrogatories inquired about the Company relocating the Complainant’s meter on a pole or structure

away from his residence, when that was done, who chose the location, who constructed the new meter structure, and the distance between the home and the meter. In addition, the Company inquired as to whether the Complainant had experienced any symptoms that he would attribute to the smart meter, and whether he had consulted a physician, and if so, whether he had received a diagnosis. Also, the Company asked about a publication cited in the Complainant's Direct Testimony called "Irradiated," and whether it was prepared under the Complainant's direction and under his supervision. Finally, the Complainant was asked to specify the portions of his Direct Testimony, if any, that were based on the Complainant's personal observations or knowledge. The Company also asked the Complainant to produce a copy of his curriculum vitae or resume.

On April 5, 2021, Complainant responded via email and stated that, with respect to the First Set of Discovery, "my answer to every question is: I plead the fifth." On April 5, 2021, the Company filed its Second Set of Discovery to Complainant and served a copy on Complainant via electronic mail and U.S. Mail, with a response date listed as April 26, 2021. The Company states that the Complainant's lack of response to its discovery requests prevents the Company from having access to information that is necessary for it to prepare and file direct testimony and meaningfully participate in the hearing. (Note: Since the Second Set of Discovery has an April 26, 2021 response date, fairness dictates that the Motion to Compel cannot be applied to it, and that the Complainant be given an opportunity to answer the questions contained therein. Therefore, the Motion to Compel will be denied at this time with regard to the Second Set of Discovery, although the Motion is renewable should the Complainant not properly answer the questions in that discovery.)

Duke also requests that the pre-filing date and hearing date be held in abeyance until resolution of the Motion to Compel.

Rule 37(a) of the South Carolina Rules of Civil Procedure provides that a party may move for an order compelling discovery where the responding party fails to answer an interrogatory or produce or allow inspection of documents requested pursuant to Rule 34. S.C. Code Ann. Regs. 103-835 states that the South Carolina Rules of Civil Procedure govern all discovery matters not covered in Commission Regulations. S.C. Code Ann. Regs. 103-835 (2012). Therefore, although a Motion to Compel is not included in Commission Discovery Regulations, Rule 37 (a) of the South Carolina Rules of Civil Procedure is applicable. SCRCP 37(a).

Also, S.C. Code Ann. Regs. 103-833 allows parties to serve upon other parties interrogatories and requests to produce and directs parties to respond to each request in writing, unless it is objected to, in which case, the objection must be stated. S.C. Code Ann. Regs. 103-833 (2012). In this case, the Complainant pled “the Fifth,” which is the Fifth Amendment to the United States Constitution. This Amendment sets forth the right against self-incrimination.

ANALYSIS

While this is not a criminal case, it appears that the right against self-incrimination as related to criminal culpability also extends to civil proceedings. In Grosshuesch v. Cramer, 377 S.C. 12, 659 S.E.2d 112 (2008) (Cramer), a civil matter, the defendants refused to respond to any discovery and instead invoked the Fifth Amendment. The South

Carolina Supreme Court explained the application of the amendment in that context as follows:

[T]he privilege against self-incrimination has been explained in practical terms as an assurance that an individual will not be compelled to produce evidence or information which may be used against him in a later criminal proceeding. . . . That a party has invoked the privilege against self-incrimination, however, does not end the matter. Instead, it is well-settled that an invocation of the privilege is confined to instances where a person has reasonable cause to apprehend danger from his answer. Indeed: The witness is not exonerated from answering merely because he declares that in doing so he will incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified and to require him to answer if it clearly appears to the court that he is mistaken.

The Fourth Circuit has instructed that a court judging the invocation of the privilege against self-incrimination asks first whether the information is incriminating in nature, and second, whether there is a sufficient possibility of criminal prosecution to trigger the privilege. In determining whether the information is incriminating, the Sharp court recognized that at least two categories of potentially incriminating questions exist. First, there are questions whose incriminating nature is evident on the question's face in light of the question asked and the surrounding circumstances. Second, there are questions which though not overtly incriminating, can be shown to be incriminating through further contextual proof.

Cramer, 377 S.C. at 22–23, 659 S.E.2d at 117–18 (internal citations omitted).

Under this authority, it is for the Commission to determine whether the Complainant's refusal to respond to the discovery request is justified, and to require him to answer if it appears to the Commission that he is mistaken. The Company opines that the questions propounded in its interrogatories are so limited and reasonable that they would not incriminate the Complainant in a criminal proceeding. It appears to this Commission that the Company is correct in this assertion, since the questions are limited to the facts of this case and do not attempt to raise the specter of criminal activity or

criminal prosecution. The Complainant is clearly mistaken in refusing to answer the interrogatories on the basis of possible incrimination. Accordingly, the Motion to Compel should be granted with regard to the First Set of Discovery propounded by the Company. The Complainant shall have fifteen (15) days from the date of the Order on the Motion to Compel to respond.

The Company further argues that, under the authority of South Carolina Rule of Civil Procedure 37(b)(2), the Commission should dismiss the Complaint, should the Complainant fail to respond. The Commission will consider dismissal if the Complainant fails to properly answer, but the Commission reserves the right to consider other relief as well as may be determined by the Commission.

Finally, the Company requests that remaining pre-filing dates and the hearing date be held in abeyance until further notice, so that the Commission can consider further action after the time elapses for responses to be filed after the Motion to Compel is granted. This is a reasonable request and is hereby granted.

CONCLUSION

The Motion to Compel should be granted as to the First Set of Discovery. The Complainant has until April 26, 2021, to answer the Second Set of Discovery. The interrogatories propounded by the Company in the First Set of Discovery do not raise the specter of incrimination. They are narrow, reasonable, and tailored to the facts of the case. The Complainant will have fifteen (15) days from the date of this Order to file responses to the discovery. If he does not comply, dismissal of the Complaint will be considered, as

well as other remedies. The motion to hold the remaining pre-filing dates and the hearing date in abeyance should be granted.

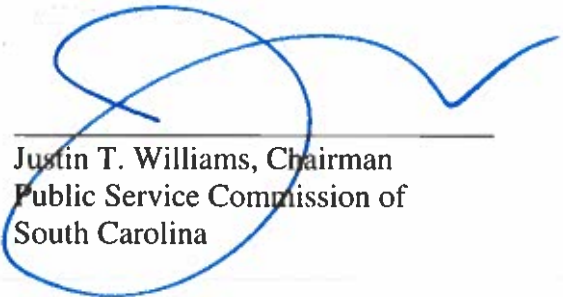
FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Duke Energy Carolinas, LLC served its First Set of Discovery on the Complainant on March 17, 2021.
2. The Complainant responded on April 5, 2021 by invoking the Fifth Amendment to the United States Constitution, which provides for the right against self-incrimination.
3. The right against self-incrimination is not properly invoked in this case, since the questions propounded are limited to the facts of this case, and do not raise the specter of criminal activity or criminal prosecution.
4. The Motion to Compel is granted as to the First Set of Discovery.
5. The Motion to Compel may not be considered applicable to the Second Set of Discovery, which contained an April 26, 2021 response date for the Complainant. At the time of this ruling, this date had not occurred.
6. The Complainant has fifteen calendar days from the date of this Order to provide responses to the Company's First Set of Discovery or face dismissal of the Complaint, or other appropriate relief.
7. The Motion to Compel is renewable as to the Second Set of Discovery if the Complainant does not provide appropriate answers.
8. The pre-filing date and hearing date should be held in abeyance until further Order of the Commission.

ORDERING CLAUSES

1. The Motion to Compel is granted as to the First Set of Discovery.
2. The Complainant has fifteen (15) days from the date of this Order to file responses to the First Set of Discovery.
3. If the Complainant does not respond with the information sought, dismissal of the Complaint shall be considered as well as other remedies.
4. The remaining pre-filing dates, as well as the hearing date are held in abeyance until further Order of the Commission.
5. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:



Justin T. Williams, Chairman
Public Service Commission of
South Carolina